ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 26 1964
JOHN F. DAVIS, CLERK

No. 534

In the Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys,
Department of Justice,
Washington, D. C., 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	11
Conclusion	20

CITATIONS

Cases:

Anderson v. *United States*, 262 F. 2d 764, certiorari denied, 360 U.S. 929	16
Bianchi v. *United States*, 219 F. 2d 182, certiorari denied, 349 U.S. 915	15
Hulahan v. *United States*, 214 F. 2d 441, certiorari denied, 348 U.S. 856	16
Lawn v. *United States*, 355 U.S. 339	13
Marson v. *United States*, 203 F. 2d 904	19
Meredith v. *United States*, 238 F. 2d 535	18
Nye & Nissen v. *United States*, 336 U.S. 613	17
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	12
Stirone v. *United States*, 361 U.S. 212	16
United States v. *Blount*, 229 F. 2d 669	15
United States v. *Green*, 350 U.S. 415	14
United States v. *Tolub*, 309 F. 2d 286	11
United States v. *Washington*, 287 F. 2d 819, certiorari denied, 366 U.S. 969	18

Statutes and Rule:

18 U.S.C. 2	16
18 U.S.C. 1951	3, 16
18 U.S.C. 3500	12
Rule 30, F.R. Crim. P.	18

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 534

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B; R. 197b-231b)[1] is reported at 334 F. 2d 678.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. A petition for rehearing was de-

[1] "R." refers to the printed appendices filed in the court of appeals. Numbers with the suffix "a" refer to pages in the appellant's appendix; numbers with the suffix "b" refer to pages in the appellees' appendix. Twelve volumes containing the original papers and the typewritten transcript ("Tr.") are also on file with the Clerk.

nied on July 28, 1964. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including September 26, 1964. The petition for a writ of certiorari was filed on September 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of the case, petitioner was properly charged with a single offense of affecting interstate commerce by means of extorting a continuing series of monthly payments, instead of being charged with a separate offense for each monthly payment.

2. Whether the trial court, after examining in camera the grand jury testimony of three witnesses, abused its discretion in refusing to turn the testimony over to the defense.

3. Whether the cross-examination of a witness was improperly restricted when the trial court sustained a general objection to a question by petitioner's counsel.

4. Whether the evidence was sufficient to establish petitioner's intent to extort.

5. Whether there were errors in the instructions.

6. Whether the trial court erred in sequestering the jury to shield it from potential publicity adverse to petitioner, and, after the materialization of such publicity, whether it erred in denying petitioner's motion for a mistrial without interrogating the sequestered jurors to determine if in some way they had obtained knowledge of the incident publicized.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

In a single-count indictment filed in the United States District Court for the District of New Jersey, petitioner, an officer of the International Brotherhood of Teamsters, Local 560, was charged with obstructing commerce from January 1952 to June 1959, by extorting $17,000 from Dorn's Transportation Inc., and from Walter A. Dorn, an officer thereof, in violation of 18 U.S.C. 1951. Petitioner was convicted by a jury, sentenced to imprisonment for seven years, and fined $10,000 (R. 768a). The court of appeals unanimously affirmed (Pet. App. B).

1. On January 1, 1952, Dorn's Transportation, Inc. ("the company"), a general cartage firm engaged in interstate commerce, moved one of its trucking terminals from New York City to a site in Secaucus, New Jersey (R. 175a-176a, 249a). That same day, petitioner and one Anthony Castellito, both business agents [2] of Teamsters' Local 560 (R. 253a, 608a), appeared at the terminal, presented the manager with a contract, and asked him to sign it (R. 175a-176a, 186a-187a). The manager sent it to Walter A. Dorn—then a vice-president of the company, owner of 15% of the stock, and brother of the founder (R. 230a, 265a, 327a)—at the company's home office (R. 177a, 187a). Dorn executed the contract on behalf of the company (R. 251a).

Shortly after the signing of the contract, the company was informed that petitioner wanted a named employee assigned full-time to a particular yard operation (R. 177a-178a, 189a; 23b). The company asserted that the yard operation in question did not require a full-time employee (R. 193a, 235a; 25b). After two meetings with petitioner and a trucking association representative, the company agreed to the request (R. 178a-179a, 191a, 233a-235a; 25b-26b).

Within a few weeks a second labor problem arose. The drivers refused to back their vehicles into the terminal bays and "break" the trailers from the tractors (R. 149a, 153a, 196a, 213a-214a, 220a-222a, 226a; 28b-29b), as had been the practice until that

---

[2] Petitioner became president of Local 560 in 1958 (R. 652a).

time (R. 153a, 159a, 180a, 183a). For about four to nine weeks the terminal yard was in a state of congestion (R. 153a, 155a, 160a-161a, 181a-182a, 220a), the operation was slowed down (R. 160a, 133a, 214a), and expenses rose (R. 241a). The company "had a continual problem" (R. 241a). Company officials attributed the congestion to the drivers' refusal to back into the bays; union officials, to the inadequacy of the facilities.[3] In an effort to resolve the dispute, Dorn, the terminal manager, and a trucking association representative, met with petitioner and Castellito (R. 235a-236a, 340a). Two meetings ended without progress (R. 236a-237a, 341a). Finally, at a meeting with petitioner and Castellito, Dorn said he could not live with the situation and asked if it could not be straightened out (R. 238a). They replied that Dorn "would have to see them to get it straightened out" (R. 238a). Dorn was then led to understand that they "were talking about the price of a man * * * approximately $100 a week" (R. 238a). Dorn said he "needed time", explaining that he was not in control of the company, and that he had neither the authority nor the means to make such payments (R. 238a-325a). At a second meeting of the three at a restaurant, Dorn agreed to do the best that he could (R. 239a), and, in his understanding, "committed [himself] to a hundred dollars a week" (R. 239a-240a), if "they could find a method for [him] to do it" (R. 244a, 385a). In the latter part of May or

[3] Numerous drivers testified for the defense they did not refuse to back in and that the congestion was caused by inadequate facilities.

June, 1952, Dorn again met petitioner and Castellito at the restaurant and paid petitioner $350 to $400 cash in the mens' restroom (R. 231a, 239a, 329a). Over the next fifteen months Dorn met petitioner at the same restaurant on three more occasions, each time paying him $350 to $400 cash in the mens' room (R. 231a-232a, 320a, 329a). The money was drawn from Dorn's personal funds without the knowledge of others in the company (R. 327a). Dorn testified that he felt payment was "necessary to the operation of [the] business", which had suffered as a result of the previous congestion (R. 240a-241a).

In the second quarter of 1953, during a meeting at the restaurant, petitioner told Dorn "I have a lawyer for you" (R. 245a)—a lawyer whom Dorn "could put on retainer" (R. 242a). Petitioner handed Dorn a slip of paper on which was written the name and address of one Michael G. Communale (R. 232a-233a, 241a-243a, 382a-383a), an assistant prosecutor of Hudson County, New Jersey (R. 390), who maintained a private law practice at an office located a few doors away from various teamster offices in a Jersey City building (R. 390a, 417a-418a, 658a-660a). Dorn, who had corporate authority to retain an attorney (R. 334a), understood this to be "the method of making the payment that [he] had committed [himself] to make at the second meeting in 1952" (R. 385a-386a). He stated to petitioner that a New York attorney was retained by the company at $200 a month (R. 243a). Petitioner made no specific demand concerning the amount of the fee (R. 243a),

and the matter was not discussed further (R. 381a; 37b).[4]

As a result of the conversation (R. 245a), Dorn sent Communale a letter dated August 10, 1953, requesting that he accept a retainer from the company (R. 371a; 194b-195b). Payments to Communale had already been initiated; from June 1, 1953, through June 1, 1959, $200 checks,[5] drawn on a company account for legal expenses, were mailed to Communale monthly (R. 69a-72a, 233a). Some of the checks were deposited in trust accounts; the rest were cashed (R. 411a-413a; 40b-41b). During this period Dorn never met or spoke to Communale. He knew of no legal service performed by Communale, and he never instructed anyone in the company to use his services[6] (R. 218a-219a, 242a, 245a-246a, 291a). The company's legal matters, including matters involving New Jersey operations, continued to be handled by the New York attorney whom the company had retained since 1944 (R. 246a, 258a-260a). When asked why he made these payments to Communale, Dorn replied "I felt that it was necessary for the continuance of the terminal (R. 249a).[6]

---

[4] A few months later, after Communale had been retained, the cash payments were terminated at Dorn's request (R. 247a). Dorn continued to meet petitioner at the restaurant several times a year in order to conduct normal company-union business (R. 247a-248a).

[5] The checks for September 1953 through January 1954 were in the amount of $400 each (R. 296a).

[6] Communale testified that he considered the payments by the company as a legitimate retainer (R. 417a), which he had received through the intercession of a disbarred at-

By letter dated April 5, 1957, Dorn informed Communale that the company wished to discontinue the retainer and thereafter employ his services on an individual case basis (R. 288a). Communale responded that such an arrangement would be satisfactory (R. 288a-289a). The monthly payments, however, were continued without interruption until June 1, 1959 (R. 70a, 295a).

From 1952 to 1959, the sole labor difficulty between the company and Local 560 which required mediation arose in January 1959 (R. 659a-660a; 132b). Between 1960 and 1962, eight such incidents occurred (R. 659a-660a, 133b-134b).

2. During a hearing on various pre-trial motions, the government attorney moved that the jury be sequestered and insulated from possible publicity in order to protect the "integrity" of the case and the position of petitioner, whose "misguided" friends might "seek to do things in the course of a trial which would only be to his detriment, but over which

---

torney, since deceased, who worked in his office (R. 406a-407a, 414a-417a). He stated that during the period of the payments he made a "superficial inquiry" concerning the pendency of a transportation tax bill in the New Jersey Assembly, but that it involved "no actual work" and that he did not inform the company of his inquiry (R. 391a-392a); that he once inquired of the New Jersey Secretary of State if the company was a New Jersey Corporation (R. 395a, 400a), apparently for his own information prior to listing the company as a corporation in his office directory (R. 290a-291a); and that in reply to a routine letter from the company's auditors he wrote that neither he nor anyone else, to his knowledge, had any unsettled claims against the company (R. 283a-284a).

he would have no control" (R. 40a-43a). The court reserved decision (R. 46a). Thereafter a jury was empaneled and sworn (Motion Tr. 59). After the government's opening statement the court excused the jury until the next day, and specifically admonished that no juror was to permit himself to receive "any information whatsoever" about the case "by any means whatsoever" (Tr. 14-15). Upon defense request, the court further ordered the jurors to refrain from reading anything in the newspapers relating to the case, and to avoid any source of information relating to the case (Tr. 15). The jury was directed to return the next day, Friday, May 24, 1963, at 10:00 a.m. (Tr. 15-16).

Trial resumed the next morning with the testimony of the first witness (R. 67a; Tr. 26). At 12:15 p.m., the beginning of the noon recess, the marshall, pursuant to orders of the court, placed the jurors under sequestration (R. 74a-75a, 79a, 138a). The afternoon session then began with a side-bar conference at which the government attorney stated that earlier in the day[3] one Walter Glockner, the shop steward at Dorn's Transportation, Inc., and a member of Teamsters' Local 560, had been shot and seriously injured[4] in front of his home, and that versions of the incident, which had been given to the Hoboken police but apparently had not been made avail-

[3] The only indication in the record concerning the time of the shooting was the statement of petitioner's counsel that it occurred between 6:00 and 6:30 a.m. (R. 139a).

[4] Glockner later died.

able to the press (R. 75a-77a), had implicated petitioner and Local 560 (R. 75a). The government attorney stated he had refused comment to the press, except to acknowledge at 9:00 a.m. that Glockner was to be interviewed that day as a potential witness (R. 76a). The government then renewed its request for sequestration (R. 76a), apparently unaware that it had already been effected. The defense opposed the motion, suggesting that they wait to see whether any prejudicial news stories developed, and, if not, continue with the trial (R. 76a-77a). Petitioner's counsel added that "A lot of rumors don't disturb me a bit" and that he could "take care of the rumors" in his closing statement (R. 77a). Shortly thereafter, an afternoon newspaper with an account of the shooting was presented to the court (R. 78a). The court then announced that, upon considering all the circumstances, it had previously ordered the jury sequestered, and stated that the order would continue in effect throughout the duration of the trial (R. 79a-81a). The sequestration thereafter continued on a 24-hour-a-day basis (R. 193b). Although they had initially been prohibited access to periodicals, radio, and television (R. 129a), the jurors were later permitted to read some edited periodicals and to watch some monitored television programs (R. 135a-136a).

Petitioner's counsel moved for a mistrial on the ground that the jurors might have been exposed to prejudicial publicity concerning the shooting before the order of sequestration, and also that they might in some way have been exposed after sequestration (R. 80a, 83a, 85a, 473a, 755a). Additionally, he

moved for interrogation of the jurors concerning their knowledge of the matter (R. 83a, 85a, 136a-137a, 474a, 755a-756a). The court denied both motions (R. 81a, 138a-139a, 474a-475a), pointing out that the sequestration had been implemented prior to any publicity of the incident (R. 138a), and that under the measures taken to assure effective isolation of the jurors it was "absolutely impossible for them to be exposed to any source of outside contact" (R. 146a). Petitioner's counsel also requested that the jury be informed that the sequestration was imposed at the instance of the government, not the defense (R. 83a, 85a, 754a-755a). Instead, the court informed the jury that the sequestration was ordered because the court felt such action necessary (R. 140a-141a).

ARGUMENT

1. The indictment (R. 7a-8a), as supplemented by the bill of particulars (R. 12a-13a), properly charged petitioner with a single offense—affecting interstate commerce by extorting a series of monthly payments. There is no basis for petitioner's suggestion that he should have been charged with a separate offense for each monthly payment. Unlike *United States* v. *Tolub*, 309 F.2d 286, 289 (C.A. 2), in which the court of appeals upheld convictions under multiple counts where the evidence disclosed that "[e]ach payment proceeded from a separate extortion," the evidence in the present case showed no separate and distinct extortion preceding each monthly payment of Communale's retainer. As noted by the court below, the "payments

were the consumation of the extortionate scheme which was a single and unified one" (Pet. App. B, 15a). And, contrary to petitioner's assertion (Pet. 28), the jury was properly instructed that "the defendant in this case may not be convicted of any offense charged by this indictment unless the offense was committed during the period of time between November 15, 1955 and June 1, 1959" (R. 699a), and that, in order to convict, the jury must find that the payments "subsequent to November 15, 1955 were the product of fear instilled in Walter A. Dorn by the defendant with intent that payments pursuant thereto be made not only prior to November 15, 1955, but to be continued thereafter" (R. 701a).

2. The trial court did not abuse its discretion in declining to make available to the defense, for purposes of cross-examination, the grand jury testimony of three government witnesses, as there was no indication of any "particularized need." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Numerous documents reflecting earlier statements by Dorn, the primary government witness, were tendered petitioner pursuant to 18 U.S.C. 3500 (R. 253a-257a). His cross-examination was extensive (265a-337a, 349a-357a, 371a-385a, 387a-389a). Additionally, at defense request, the court examined the grand jury testimony of all three witnesses and concluded that the withholding would not be detrimental to petitioner (R. 357a-358a, 361a-362a). Quoting from *Pittsburgh Plate Glass Co.* v. *United States*, *supra*, at 400, concerning grand jury proceedings, the court stated:

> "To make public any part of its proceedings would inevitably detract from its efficacy. * * * [N]ot only would the participation of the jurors be curtailed but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused." [R. 362a.]

The court then noted:

> I think that passage has particular application to this case. [R. 362a.][9]

In any event, the matter was not raised in the court below, and there are no "exceptional circumstances" warranting initial review by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

3. The cross-examination of Dorn was not improperly restricted. Dorn was asked whether petitioner had made any demands after the payments to Communale had begun and after Dorn had told petitioner that he could not continue the cash payments. Dorn replied that he had not. Petitioner's counsel then asked, "So that any arrangement that you had to pay him money ended when you said you wouldn't pay it any more in 1954, isn't that right?" (R. 333a). Government counsel objected without specification of grounds, and the court sustained the objection.

That ruling was correct. As the court of appeals noted, the question was not only vague and argumentative, but it called for the opinion of a layman as to

---

[9] The court elsewhere noted the apparent reluctance to testify on the part of witnesses for both the government and the defense, and observed that fear seemed evident in their demeanor (R. 190b-191b).

whether the contract had come to an end—a legal conclusion which lay within the province of the court. (Pet. App. B. 23a). In any event, petitioner's counsel elected not to reframe the question, or otherwise to pursue the matter further.

4. There was ample basis for the jury's determination that petitioner intended to extort the payments to Communale. The $100-a-week payments, Dorn explained to petitioner and Castellito, were beyond his personal means, and he simply agreed to do the best that he could until a method was found for him to meet the demand. When petitioner gave him the name of a lawyer to retain, Dorn had no doubt but that this was "the method" (R. 386a). There was no other explanation for petitioner's action. The fact that the monthly payments were sent to Communale, not petitioner, was relevant in considering the issue of intent, and the jury was so instructed (R. 695a), but it did not preclude a finding of extortion under 18 U.S.C. 1951. *United States* v. *Green*, 350 U.S. 415, 420.

5. The various objections to the charge are without merit.

a. The trial court, after instructing the jury to consider all the evidence (R. 691a, 693a), and after calling its attention to the conflicting testimony concerning the reason for the congestion at the terminal, charged that if petitioner were found to have effected such congestion the jury might consider whether that circumstance was "one which reasonably generated fear on the part of Walter A. Dorn" (R. 711a). Petitioner now claims as error the fact that the court

did not also specify as relevant "the evidence of the friendly relationship between Dorn and petitioner, and the absence of any threats or demands by petitioner in the post-limitation period" (Pet. 31). It was entirely proper, however, for the judge to focus upon the issue of intimidation raised by the evidence of congestion, without referring in detail to all of the surrounding circumstances in light of which that issue must be appraised.

b. Equally without merit is the contention that the trial court erred in refusing to instruct the jury to acquit petitioner if the payments by Dorn were found to have been offered as a bribe, rather than extorted. There was no evidence whatever suggesting bribery; the defense built its case, not on the ground that the payments to Communale represented a bribe, but on the ground that no such payments were negotiated or received by petitioner (R. 619a-620a, 622a, 624a, 627a, 639a, 154b-155b). Since the jury was clearly instructed that, in order to convict, it must find that the payments were induced by wrongful use of fear (R. 694a-695a, 698a-699a, 701a-702a, 711a), there was no occasion to introduce the question of bribery. *Bianchi* v. *United States*, 219 F. 2d 182, 192-193 (C.A. 8), certiorari denied, 349 U.S. 915. An instruction on a crime not charged would merely have confused the issue. *United States* v. *Blount*, 229 F. 2d 669, 671 (C.A. 2).

c. The trial court committed no error in instructing the jury that it might find commerce affected if the resources of Dorn's Transportation, Inc., a business engaged in interstate commerce, were depleted

by extorted payments of money (R. 695a, 696a, 711a). Petitioner argues that such an effect on commerce is too slight, and implies that an actual interruption or stoppage of commerce is necessary to bring 18 U.S.C. 1951 into play (Pet. 13). Such a construction would wholly defeat the purpose of the Act, which speaks in broad language, manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion", and "outlaws such interference 'in any way or degree' ". *Stirone* v. *United States*, 361 U.S. 212, 215. The exaction of money from a company engaged in interstate commerce is itself a sufficient interference with commerce to come within the proscription of the Act. *Anderson* v. *United States*, 262 F. 2d 764, 770 (C.A. 8), certiorari denied, 360 U.S. 929; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856. This is especially true in a case like the present one, where the jury might reasonably find that a serious interruption to the flow of goods was the consequence with which Dorn was threatened if he refused to pay. Plainly, the victim of extortion need not actually endure the threatened consequences of non-payment in order for the statute to be applicable.

d. The trial court did not err in charging, with proper elaboration, that the jury might consider petitioner's guilt as an aider and abettor under 18 U.S.C. 2 (R. 696a-697a, 725a).[10] Petitioner asserts that

[10] The Reviser's Notes concerning 18 U.S.C. 1951 state that the former words "or acts in concert with another or with others" were omitted as unnecessary due to the applicability of 18 U.S.C. 2.

the evidence did not sufficiently suggest petitioner's collaboration with others to justify such an instruction. But the commission of the offense, and the participation of Communale and Castellito in certain aspects thereof, was plainly established. Communale, by petitioner's direction, was the recipient of the extorted payments. Castellito accompanied petitioner at the time the cash payments and the later retainer payments were originally induced.[11] Petitioner could have been found a collaborator, aider, and abettor of either or both. Consequently, the submission of the case to the jury on this theory, employing language quoted with approval in *Nye & Nissen* v. *United*

---

[11] The following excerpt from petitioner's testimony on direct examination (R. 622a), which suggests an attempt to avoid responsibility for acts which might have been performed by Castellito, is itself sufficient justification for an instruction on aiding and abetting.

Q. Was there ever any understanding with you that Dorn had committed himself to pay you a hundred dollars a week or to Castellito, if it was possible to pay that much?
A. No, Sir, You are talking about Anthony Provenzano?
Q. I'm talking about you, when you were present.
A. In my presence?
Q. Yes.
A. No, sir.
Q. Did you ever make an agreement with Dorn or did Castellito or anybody else make it when you were there that Dorn should pay even a penny?
A. In my presence?
Q. Yes, Sir.
A. I'm answering for Anthony Provenzano. No, Sir.
Q. Did Dorn ever commit himself to pay any money to anybody in your presence?
A. In my presence, no, sir.

States, 336 U.S. 613, 619 (R. 697a, 725a), was appropriate. See *Meredith* v. *United States*, 238 F.2d 535, 541-542 (C.A. 4). The fact that the indictment was not framed in terms of aiding and abetting is immaterial. *United States* v. *Washington*, 287 F.2d 819, 821 (C.A. 7), certiorari denied, 366 U.S. 969.

In any event, as noted by the court below (Pet. App. B. 27a), petitioner's present objection to the instruction was not raised at trial. There he complained only that the terms of the instruction permitted a finding of guilt if petitioner were found to have associated himself in the venture without knowledge thereof, and that the instruction could not be given where no one else was charged in the indictment as a principal (R. 719a, 724a-725a). Neither of these grounds was meritorious and neither is now urged. Petitioner did not, at trial, raise his current objection that the evidence failed to warrant the giving of the charge, and certainly he did not apprise the trial court of such a ground with the specificity required by Rule 30, F. R. Crim. P.

6. The court did not err in sequestering the jury to shield it from potential publicity concerning collateral matters which might prove prejudicial to petitioner. Indeed, subsequent events (the news stories publicizing Glockner's shooting) demonstrated the wisdom of the court's decision. As every provision was made for the jurors' comfort and convenience (R. 79a-80a, 136a, 141a), and as the court informed the jurors that the sequestration was ordered because the court deemed such action necessary (R. 140a-141a), there is no basis for the inference that petitioner was prejudiced by the move.

Nor was it error to deny petitioner's motion for mistrial based on later news stories regarding Glockner's death, or his request that the jurors be interrogated.[12] Although the shooting occurred before the jurors were isolated, they had previously been instructed to avoid any information relating to the case (Tr. 14-15), and they were formally sequestered before the shooting was publicized. As noted by the court of appeals:

> There is no evidence in the record and nothing was offered to the court below showing that newspapers and broadcasts reported the Glockner affair, let alone intimated that Provenzano might be involved, *prior* to the time that the jurors were cut off from outside sources of information. Particularly in view of counsel's persistence in pursuing his objections in regard to this aspect of the case, it is not unreasonable to assume that if positive evidence to this effect had in fact existed, it would have been brought forward for consideration by the court. [Pet. App. B. 41a-42a, n. 17.]

And after sequestration was ordered, the trial court noted that it was "absolutely impossible for [the jurors] to be exposed to any source of outside contact" (R. 146a).[13]

---

[12] The question proposed by petitioner's counsel to begin the requested interrogation, linked petitioner and Local 506 with "a murder" and "F.B.I. investigations" (R. 474a). The question was so prejudicial to petitioner that it might, if asked, have required reversal of his conviction. See *Marson* v. *United States*, 203 F. 2d 904, 908 (C.A. 6).

[13] In none of the cases cited by petitioner for the proposition that the news publicity required interrogation of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

October 1964

---

jurors (Pet. 25-26), were the jurors isolated from outside contact.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 748103 334